

repay to the respondents all sums paid by them which they would not have been liable to pay but for the Road Traffic Ordinance. The judgment obtained by the injured third party against the appellant was in respect of a liability covered by the terms of the policy within the meaning of section 80(1) of the Road Traffic Ordinance, 1958 and by virtue of that section it became the duty of the respondents to satisfy that judgment notwithstanding that they were entitled to avoid the policy by reason of the failure on the part of the appellant to observe and fulfil the conditions precedent to their liability. In instituting their action against the appellant the respondents were doing no more than pursuing their legitimate right to be reimbursed with the amount which they would not have been liable to pay to the injured third party but for section 80(1) of the Road Traffic Ordinance, 1958.

The appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *A.K.J. D'Cruz & Co.; Lovelace & Hastings.*

HANAFIAH, RASLAN, MOHAMED & PARTNERS v. WENG LOK MINING CO. LTD.

[O.C.J. (Chang Min Tat J.) March 31, 1976]

[Kuala Lumpur — Civil Suit No. 1568 of 1970]

Contract — Accountants employed to prepare and audit accounts and to submit tax returns — Accountants subsequently successful in reducing tax liability of company — Alleged agreement to pay fee of \$10,000 for work — Plea that there was no consideration for the further fee.

Accountants — Preparing and auditing accounts — Reduction of tax liability — Whether extraordinary skill.

In this case the plaintiffs claimed the sum of \$10,000 which they alleged was due to them for the work they had done for the defendants in successfully reducing their tax liability for the years 1964-1967 inclusive. The defendants contended that the work undertaken by the plaintiffs in reducing the tax liability was part of the work which was undertaken for them by the plaintiffs as their accountants and that this work had been paid for by them by separate fees for preparing accounts, auditing them, making up their returns and submitting proposed tax computations. The defendants further contended that the original assessment of revenue was the result of errors made in the tax computations. They therefore maintained that there was no consideration for the further fee agreed and they refused to pay. They counter-claimed for damages because of the mistake made by the plaintiffs, as a result of which they had been assessed for a large amount of tax.

Held: (1) in this case the plaintiffs had not shown that extraordinary skill was required of them to get the tax reductions and therefore the claim must be dismissed;

(2) it was reasonable to hold that but for the mistake of the plaintiffs the demand for the tax would not have been made or if it was made it would have been for the much smaller adjusted figure. The legal fees, costs and penalty paid by the defendants flowed reasonably from the negligence of the plaintiffs and they were therefore liable to pay damages therefor.

Cases referred to:-

- (1) *Stilk v. Myrick* 170 E.R. 1168.
- (2) *Ramachandra Chintaman v. Kabu Raja & Anor.* I.L.R. 1878 Bom. 362.
- (3) *Hartley v. Punsonby* 119 E.R. 1471.
- (4) *Greaves & Co. (Contractors) Ltd. v. Beyuham, Meikle and Partners* [1975] 1 W.L.R. 1095.

A CIVIL SUIT.

R. Sadacharam for the plaintiffs.

K. Thayalan for the defendants.

Chang Min Tat J.: The claim of the plaintiffs, a firm of accountants and tax consultants against the defendant firm was for a fee of \$10,000 which they said was due to them for the work that they had done for the defendants in successfully reducing their tax liability for the years of assessment 1964 to 1967 inclusive. The defendants had been assessed to tax in the sums of \$8,658, \$29,947.20 and \$40,652.40 and \$49,500 for the years of assessment 1964 to 1967 respectively. As a result of the representations made by Mr. Timothy Phua a partner of the plaintiff firm, representations which were summarised in a letter dated August 6, 1969 Revenue reduced the assessment for 1964 to nil, for 1965 to \$6,578.40, for 1966 to nil, as also for the year of assessment 1967. There was therefore a saving for the defendants of \$122,179.20. It was contended by the plaintiff firm that this fee was agreed to between the managing-director of the defendant-firm and Mr. Phua. The original fee was confirmed by a letter dated August 3, 1969 for \$5,000 but subsequently another partner struck a bargain with the defendants to raise the fee to \$10,000 on a contingency basis, if the tax should be successfully reduced to below \$20,000. This bargain was also confirmed in writing by the defendants.

One would have expected that the defendants would have been grateful for this enormous reduction in their tax liability and would have gladly paid the fee of \$10,000. But that unfortunately was not so. The case of the plaintiffs was not the whole story. The defendants came to the idea that the work undertaken by the plaintiff firm in reducing the tax liability was part of the work which they said was undertaken for them by the plaintiffs as their accountants and that this work had been paid for by separate fees for preparing accounts, auditing them, making up their returns and submitting proposed tax computations. The defendants considered that the original assessment of revenue were the result of errors made in the tax computations. They maintained therefore that there was no consideration for the further fee agreed. On this score, they refused to pay.

Various errors were alleged. It will be sufficient to deal with three of them. The first concerned the sum paid for mining rights. The defendants claimed that their books showed the sum of \$188,859 whereas the plaintiffs were said to be in error in admitting to only a sum of \$104,800. The sum of \$188,859 was indeed claimed in the tax returns but was disallowed. A distinction should, I think, be drawn between making a claim and not pursuing it further when it was disallowed. I am however satisfied with the evidence that the sum entered in the defendants' books included a sum of \$84,059 which were in actual fact losses incurred by another entity, namely the partners, who are presumably the antecedents of the defendant-firm. These losses were at law not claimable and it would be an exercise in fatuity to proceed to do so. It was not pursued by Mr. T. Phua in his intervention. That fact itself must speak against it. I am therefore satisfied that in not pressing for the bigger sum, the plaintiff firm was not in error.

The second concerned the sum of \$55,008.34 for construction of buildings and palongs in 1964. Under the claim for mining depletion allowance, there was a sum of \$33,565.41 under this head as at January 1, 1964 so that the total came to \$88,573.75. It was alleged by the defendants that the plaintiffs had failed to claim relief with respect to the capital expenditure of \$55,008. An examination of the accounts submitted by the plaintiff firm on behalf of the defendants showed that this sum was in fact claimed. When it came to revise the tax liability Revenue, however split up the capital expenditure for buildings into its two components as indeed it would appear correct to do and gave full relief on such expenditure. I have no doubt that claiming a relief for \$88,573.75 as at January 1, 1964 was an error, since \$55,008 was incurred during 1964 and that the negligence consists in not making an amendment for the year of assessment 1964.

The third concerned certain machinery which the books showed was purchased in 1964 at a cost of \$137,389. For this machinery, the miners were entitled to an annual allowance of $7\frac{1}{2}\%$ and also entitled to an initial allowance of 60% if the machinery was used in the production of tin ore. In the plaintiffs' original and even in the subsequent amended tax computations of the defendants' liability for the year 1964 while a claim for the annual allowance was made correctly at $7\frac{1}{2}\%$ the plaintiffs claimed for the initial allowance on mining assets only at 20%. These assets are machinery which clearly was used in the mine and while it was true as was said that the information for its use should come from the clients I have for myself no doubt that there was a duty on the part of the plaintiffs as tax consultants to ascertain from the defendants whether this machinery was bought for actual use. It would be difficult to imagine a mining concern with such a relatively small capital sinking such a large sum into machinery for use in the future. It was in fact used on the mine and formed an integral part of the plant and therefore qualified for the full initial allowance at 60%. In my view therefore the plaintiff firm was in error in not making this claim.

The work undertaken by Mr. Timothy Phua for the defendants for which the fee of \$10,000 was claimed, as evidenced in his letter of August 6, 1969 was in respect of the following particulars:

1. for the year of assessment 1964
 - (a) a 60% claim for initial allowance on \$137,389 spent on machinery consisting of diesel engine motors and gear drives which were all interconnected to the gravel and water pumps and formed an integral part of the qualifying plant expenditure; and
 - (b) legal expenses;
2. for the year of assessment 1965
 - (a) depletion allowance for capital expenditure totalling \$55,008 for the year 1964 in respect of buildings and palong, said to have been omitted;
 - (b) initial allowance on qualifying expenditure diesel engine and gear drive on \$21,649;
 - (c) entertainment expenditure \$7,870;
3. for the year of assessment 1966
 - (a) entertainment allowance.

A I believe the \$21,649 is in error. From the accounts the amount of the purchases for machinery in 1965 came to \$25,649 and this sum would qualify for initial allowance.

B Revenue readily enough conceded the representation in regard to the full initial allowance of 60% on \$137,389. The depletion allowance for \$55,008 was also allowed. Revenue further allowed the legal fees and the initial allowance on machinery purchased in 1965. It rejected the entertainment claims.

C As for the machinery purchased in 1965, it was also clear that the plaintiff firm had again in error claimed 20% for initial allowance in addition to the $7\frac{1}{2}\%$ annual allowance, instead of 60%.

D On the concession of Revenue, the assessments of tax liability for 1964 for year of assessment 1964 and all subsequent years had necessarily to be revised. It was a chain reaction, the result of which effected the tax-payer's liability for tax till 1967. The adjustments were contained in a working paper in the form of a letter dated November 13, 1969. The full 60% initial allowance on \$137,389 meant (1) an increase of allowance from \$27,478 (at 20%) to \$82,433 (at 60%) and (2) an unabsorbed capital allowance of \$33,310 which could be carried forward into the following year of assessment. It also meant that for the year of assessment 1965, the written-down value for the machinery that could be carried forward from the previous year was \$44,652 and not \$99,607, which added to purchases for 1965 would qualify for the annual allowance of $7\frac{1}{2}\%$.

E It might be clearer to set down the figures. For the year of assessment 1964, on the sum of \$137,389, the claim was

F

(a) for annual allowance at $7\frac{1}{2}\%$ —	\$10,304	
(b) for initial allowance at 20% —	\$27,478	\$37,478

and as allowed

(a) for annual allowance at $7\frac{1}{2}\%$ — \$10,304
 (b) for initial allowance at 60% — \$82,433 \$92,737

G The corresponding adjustments to the written-down value were

(a) as claimed — \$137,329
 less total allowance — \$ 37,478 \$99,607
 (b) after adjustment — \$137,329
 less total allowance — \$ 82,433 \$44,652

H If to this written-down values was added the purchase of \$25,649 for 1965, the relative figures would be \$125,256 and \$70,301 which would qualify for the $7\frac{1}{2}\%$ annual allowance. The defendants would be entitled to only \$5,273 as against the \$9,394 claimed. However the defendants should have had claimed for the 60% and not 20% on the \$25,649. In other words, they were entitled to initial relief at \$15,389 and not merely \$5,130. In all they would be able to claim and they were finally allowed \$20,662 instead of \$14,524.

I The consequent change in their tax assessment for the year of assessment 1964 by reason of the claim for allowance (both annual and initial on the sum of

\$137,389) being increased from \$37,782 to \$92,737 was a loss, and an unabsorbed capital allowance of \$33,310. The net effect was that no tax was payable, the tax previously assessed at \$8,658 being discharged.

For the year of assessment 1965 with this unabsorbed capital allowance and the new initial and annual allowance being taken into consideration, the chargeable income was reduced to \$16,446 and tax payable was \$6,578.40 as against the \$29,947.20 previously assessed.

For the year of assessment 1966, the adjustment was in respect of \$24,811 for capital allowance. Whether this was consequent on the adjustment for previous years it is not possible to say. However Mr. Timothy Phua's letter contained only a reference to entertainment allowance and the inference would appear to be that the adjustment was consequential. The results were that there was a sum of \$22,396 for an unabsorbed capital allowance to be carried forward and that the tax of \$40,652.40 previously assessed was discharged.

For the year of assessment 1967 there were revisions in the adjusted profit and in the capital allowance. They would appear to be favourable to the defendant's tax liability but even if it was presumed that they were the result of Mr. Timothy Phua's intervention, they must in the absence of any direct references, be consequential on the actual representations. These revisions with the unabsorbed capital allowance brought forward reduced the tax assessed from \$49,000 to nil, the \$500 actually charged being the minimum development tax which had no relation to the accounts for tax assessment.

It will therefore be seen that the tax muddle sprung from the failure to claim the full initial capital allowance on engines for the years of assessment 1964 and 1965. There was no error in respect of the \$1,914 for legal fees for the year of assessment 1964. The claim was made but rejected. A subsequent request for reconsideration with perhaps somewhat more particulars was successful.

On this evidence, the defendants said that the assessments were wrong, being based on mistakes or omissions in the computations submitted by the plaintiffs and that the correction of such errors was a necessary part of the work and was included in the fee charged and paid for, for tax work. The plaintiffs did not deny that they were engaged to prepare and submit the returns and the liabilities of the defendants to tax in accordance with their (the plaintiffs') computation of tax but claimed through Mr. Phua that the reassessment was additional thereto and must be paid for. As I understood him, this was on the concept that he did not make any mistake. That might be so, but there were mistakes. They were made by Mr. Ong Boon Pah, who was the partner in charge of the defendants' tax affairs. Mr. Ong Boon Pah had now left the firm. Mr. Timothy Phua had taken over, and having found a way to reduce the assessments so drastically, he said his firm should be paid the contingent \$10,000 fee agreed on.

The defendants nevertheless maintained that there was no consideration for the promise to pay the \$10,000.

A Mr. Thayalan for the defendants relied on *Stilk v. Myrick*⁽¹⁾ and *Ramchandra Chintaman v. Kalu Raju & Anor.*⁽²⁾ for the proposition of a *nudum pactum* where the consideration was for work which the plaintiffs were bound to perform under their original contracts of employment. He distinguished the case of *Hartley v. Ponsonby*⁽³⁾ on the facts. His case did not as in that case call for extra work which the employees were not bound in contract to perform. Mr. Sada-charam for the plaintiffs did not cite any case. He contended on the facts that the adjustments of the income tax computations were new and additional work. And he also made a point that the computations affected the years 1966 and 1967 for which period the plaintiff firm had not been paid any remuneration or fees. As to this point, there is in my view no substance whatsoever in it. Because the allowances that were properly allowable and subsequently claimed were allowed to be carried over to these years, it did not mean that the plaintiff-firm had on this fact alone done work for these two years.

D So far as I can advise myself on the law, I believe this case must be decided on the one question whether the correction called for the ordinary skill of the plaintiffs, on which the defendants could rely. It would be another matter if some extraordinary skill or effort was required. The law, as stated in the latest case of *Greaves & Co. (Contractors) Ltd. v. Baynham, Meikle and Partners*,⁽⁴⁾ first reported in the *London Times* on May 15, 1975, per Lord Denning, M.R. is as follows at pages 1099-1100:

"It has often been stated that the law will only imply a term when it is reasonable and necessary to do so in order to give business efficacy to the transaction; and, indeed, so obvious that both parties must have intended it. But those statements must be taken with considerable qualification. In the great majority of cases it is no use looking for the intention of both parties. If you asked the parties what they intended, they would say that they never gave it a thought: or, if they did, the one would say that he intended something different from the other. So the courts imply — or, as I would say, impose — a term such as is just and reasonable in the circumstances."

and at page 1100:

G "Apply this to the employment of a professional man. The law does not usually imply a warranty that he will achieve the desired result, but only a term that he will use reasonable care and skill. The surgeon does not warrant that he will cure the patient. Nor does the solicitor warrant that he will win the case. But when a dentist agrees to make a set of false teeth for a patient, there is an implied warranty that they will fit his gums: see *Samuels v. Davis* [1943] K.B. 526."

and at page 1101:

H "It seems to me that in the ordinary employment of a professional man, whether it is a medical man, a lawyer, or an accountant, an architect or an engineer, his duty is to use reasonable care and skill in the course of his employment. The extent of this duty was described by McNair J. in *Bolam v. Friern Hospital Management Committee* [1957] 1 W.L.R. 582, 586, approved by the Privy Council in *Chin Keow v. Government of Malaysia* ([1967] 2 M.L.J. 45), [1967] 1 W.L.R. 813, 816:

I "... where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."

In that case the Court of Appeal dismissed an appeal by a firm of consultant engineers from a decision of the High Court which held that the plaintiffs were entitled to a declaration of liability and an indemnity for the cost of work necessary to prevent and rectify damage to a building built by them under a "package deal" made on their behalf with the appellants.

On the evidence I do not think that the plaintiffs had shown that extraordinary skill was required. The purchase of such a large quantity of machinery in 1964 in the circumstances of the defendants' finance ought, even if no instructions were given, to have prompted an enquiry as to their actual use and it ought to be reasonably imputed to the plaintiffs that they did know of the availability at law of the allowance of 60%. I must therefore reject Mr. Timothy Phua's contention that the work was additional and justified a special fee. It was work which did not call for any special knowledge of tax law or accountancy and which he might not be as an individual but which he as a partner was certainly bound to correct or have his firm face an action for damages for negligence. The proof of this lay in the ready concession of Revenue to the new claim. The almost immediate acceptance must mean that it was patent and clear and unanswerable. No arguments were necessary.

Mr. Ong Boon Bah who was subpoenaed to give evidence did not think that the correction entailed much work or knowledge. He was of the view that this was merely contingency work, or follow-up work. He frankly conceded that if any mistake had been made by any of the accountants, the firm must hold itself responsible. And just as frankly, he admitted that in the absence of any definite instructions that the claim was not possible, it was an omission not to have claimed the full allowance.

Before he gave evidence, he referred to a telephone message which if correctly recorded by his receptionist would appear to imply a threat of adverse publicity if he did not co-operate with the claim. I advised him that if there was no misunderstanding and if he felt strongly about it, he could take the matter up with the appropriate authorities, but that since he was before the court on a proper subpoena, I would hear from him the evidence he would give.

Mr. Ong Boon Bah's evidence, if I may say so, does him honour. Fear of adverse publicity, if any, did not deter him in his frank admissions. No one born to this imperfect world of ours is above making a mistake. It is only correct and sufficient if a mistake is made to own to it and to ensure that steps were taken to correct it.

On another aspect, I was glad to have his evidence. It confirmed the opinion I had that the work done by Mr. Timothy Phua had been paid for and there was no justification for the further fee of \$10,000 now claimed. The claim is therefore dismissed with costs.

The defendants counterclaimed for damages. The damages were set out as follows:

(a) Legal fees for C.S. 1787/68 and for filing an appeal to the Federal Court — \$ 645.90

A (b) Costs paid to Revenue on the judgment — \$ 200.00
(c) penalty on the tax assessed — \$ 657.84
(d) sum claimed by the plaintiffs — \$10,000.00
Alternatively

(e) previous fees paid to the plaintiffs — \$ 6,497.95
The counterclaim was for \$1,503.74 made up of (a), (b), (c) together or \$11,503.74 made up of this sum together with (d), or \$8,001.69 made up of (a), (b) and (c) with (e).

B The claim for (d) \$10,000 was with respect so obviously wrong that I was as much surprised by it as by the hesitation to abandon it. If the judgment had been for the plaintiffs, then the defendants would have to pay the \$10,000. If the plaintiffs' claim had been dismissed, then the defendants would not have to pay it. But in the end, the defendants did abandon it.

C The claim for (e) \$6,497.95 was obviously made in anticipation of an adverse judgment and the basis for it was a set off against the "total" fee of \$10,000. It was surprisingly retained but in the circumstances it had no relevance. The defendants were bound to pay the proper agreed fees for the work done.

D This leaves (a), (b) and (c) above. The civil suit referred to was an action taken by Revenue for the recovery of the original claim for an enormous sum which, if I may say so without disrespect, was probably beyond the means of the defendants to pay but which they felt they were not due to pay. In the latter circumstance, it must be reasonable to hold that but for the mistake of the plaintiffs, the demand would not have been made or if it was made, it would have been for the much-smaller adjusted figure which it was not beyond the bounds of probability, the defendants would be able to pay. I consider it therefore reasonable to conclude that these heads of damages (a), (b) and (c) flow reasonably from the negligence of the plaintiffs.

F In the result, the plaintiffs' claim is dismissed with costs, and the defendants' counterclaim is allowed at \$1,503.74 with costs, such costs (i.e. of the counterclaim) to be assessed as under the Subordinate Court Rules.

Claim dismissed.

Solicitors: *Michael Chen & Lee; Skrine & Co.*

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